United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,714

ROLAND F. VENEY, JR.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

843

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT

Statement of Questions Presented

1. Whether, where police had no information connecting appellant with the commission of a crime other than that he was found riding as a passenger in a vehicle driven by another who had been observed at the scene of the crime sometime before it was committed, there was "probable cause" for appellant's arrest without a warrant.

2. Whether, in a situation where the driver of a vehicle in which appellant was riding was under arrest and the vehicle itself was in police custody, a search of the vehicle without a warrant was legal.

3. Whether, appellant's confession was voluntary and properly admissible in evidence after motion to suppress where appellant, under coercive circumstances, was brought for identification before complaining witnesses and impliedly urged by police to confess, before being brought before a committing magistrate or a commissioner under the Federal Rules of Criminal Procedure, Rule 5.

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Cases Cited

*Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,714

ROLAND F. VENEY, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of conviction entered by the United States District Court for the District of Columbia. Jurisdiction of this cause is had by this Court pursuant to Title 28, Sec. 1291, United States Code, as amended, and Rule 37 of the Federal Rules of Criminal Procedure. Leave to prosecute this appeal in forma pauperis was granted by order of the United States District Court for the District of Columbia as contained in the original record on appeal. The reporter's transcript of the trial proceedings was transmitted to this Court by the Clerk of the District Court, as directed by order of this Court dated July 22, 1964, and thereafter docketed in this Court.

STATEMENT OF THE CASE

Roland F. Veney, Jr. was charged with 4 counts of assault with intent to commit robbery against 4 different persons at the same time and place, and 1 count of carrying a dangerous weapon, by indictment filed, and upon arraignment pleaded not guilty thereto. Thereafter, on April 1, 1964 appellant, by his attorney, filed a motion to suppress evidence, said motion being directed to suppression of evidence including:

1. Any weapons taken from the automobile in which defendant was arrested...

2. Any oral or written statements taken from defendant...

3. Any identification made of the defendant...

obtained by police officers by an arrest and a search of an automobile without a warrant or other legal authority. This motion was entertained by the trial Court, and denied April 10, 1964. The same motion was renewed at the trial (Tr. 5, 12), and denied by the Court April 22, 1964 (Tr. 5, 38). The motion was renewed at the conclusion of the evidence and again denied, as was a motion for judgment of acquittal (Tr. 162, 163). At the outset of the trial appellant moved to compel the prosecutor to elect on the first 4 counts of the indictment (Tr. 3) which was later reviewed and denied (Tr. 163, 164).

A trial was had April 21, 22, and 23, 1964 and the defendant convicted on all 5 counts by jury verdict (Tr. 189, 190) and sentenced by the Court May 19, 1964 to serve 3 to 9 years on each of counts 1, 2, 3, and 4, said sentences to run concurrently and sentenced to imprisonment for 1 year on count 6, said sentence to run concurrently with the sentences on the first 4 counts. Appellant has commenced serving this sentence and is presently imprisoned at the D. C. Jail.

Trial Proceedings
The Government's Case

The Holdup. At about 5:30 P. M. on the 6th day of December 1963, Mr. Eli Simony, Mrs. Ada Simony, his wife, Mr. Sidney F. Brenner, and Mrs. Freda L. Brenner, his wife, were all tending their store known as The Capitol Wholesale Distributors located at 7616 Georgia Avenue in the District of Columbia, and operated as a corporation by the four. Two men walked into the store, drew pistols, announced "this is a hold-up", and ordered the four into a back room of the store./ One of the two men accompanied them into the back room, then left the back room returning to the front of the store. The four could not see into the front portion of the store from the back room, but heard the front door bell indicating that the front door had been opened. At about the same time

the telephone in the back room rang. Mrs. Brenner answered it, and without inquiring who it was told the caller that they were in trouble, not to ask any questions, just call the police, and then hung up. Mr. Brenner went out the back door of the store, ran down the street and called the police. The other three went from the back room of the store into the front portion of the store and noticed that a jewelry box which had previously been inside of a desk was on top of the desk and the contents emptied out, but nothing was missing. These contents were diamonds and other jewelry in small boxes and paper bags. They checked and found that nothing was missing, nor could they find anything at all missing from within the store.

Descriptions Given. A few minutes later police came to the store and descriptions of the two men were given (Tr. 106).

Earlier Visit to Appliance Store. Sometime earlier a man had come into an appliance store next door to Capitol Wholesale Distributors, and because he acted suspiciously an appliance store employee watched him as he left the appliance store and get into a car in front. The employee copied down the license number of the car. He noted that there were two or three other persons in the car. He saw the car drive off. Later the employee saw the same person coming out

of the Capitol Wholesale Distributors (about 30 to 45 minutes later). When the police arrived at the Capitol Wholesale Distributors the employee of the appliance store gave the police the license tag number, because he was told of an attempted robbery at Capitol Wholesalers and he thought it may have been the same person that was in his store before (Tr. 124-127).

Lookout Broadcast. The policeman, to whom the appliance store employee gave the tag number of the car, made a general radio broadcast from his police scout car to all units for a lookout for a red car District tags KG-346 with three or four negro males in the car (Tr. 161, 162).

Officer Poole Stops Auto, etc. During this time Officer Poole assigned to the K 9 (dog) Corps was in Cruiser 95, cruising in the vicinity of 7th Street, N. W., south of Rhode Island Avenue. He first heard a broadcast over the radio to Scout 62 relating to a hold-up at Capitol Wholesalers. In a matter of minutes Scout 62 came on the air with a lookout for a late model red car, District tags KG-346 containing three or four colored males, going south on Georgia Avenue. He proceeded out toward North Capitol Street, and then a dispatcher broadcast from headquarters came out with a listing on the tag number giving the name of the listed

owner of the car and his address. Officer Poole saw the car mentioned coming south on North Capitol Street, made a turn, dropped in behind it, used the red light siren, and pulled the car over and notified the dispatcher, went up to the car, talked to the driver, who got out taking his keys with him, checked his driver's license, registration card, and found him to be the same person whose name was given over the dispatcher's broadcast. He saw two other persons in the car, one in the front seat, one in the rear seat, and one of them he identified in the Court room as the appellant, Veney. Then Officers Mode and Clark arrived in another cruiser. The three officers took the other two out of the car and searched them. Officer Clark searched the car. Officer Clark found a 38 black revolver, and a 32 chrome-plated revolver, underneath the right front seat of the car. The two guns were identified by Officer Poole at the trial and introduced in evidence (despite the motion to suppress). Officer Poole did not talk to the two occupants of the car at all, nor did he tell the driver of the car that he was under arrest (Tr. 95, 96).

Suspects Taken to Scene and Identified. The three were taken to Capitol Wholesalers. Detective Allen talked to the three suspects in front of Capitol Wholesalers telling them

that the purpose was to take them into the store and let the complainants look at them. He took them in one at a time, and they were identified by the four store owners without giving them the opportunity to talk to counsel or warning them that statements made might be used against them (Tr. 141). He told the appellant, that the previous suspect (driver of auto) upon being confronted by the complainants had apologized to them, saying that he was sorry, he did not mean to hurt anybody, and he needed money (Tr. 142). Upon taking Veney into the store to be confronted by the four complainants, Detective Allen or another officer said "Do you want to say anything to the people." And again "Don't you want to say anything." Whereupon Veney said "Well, I apologize" (Tr. 78).

Robbery Squad, Lineup, etc. Veney was then taken to Robbery Squad Offices for "processing" until about 10:00 - then to the cell block (Tr. 142) and was not brought before the Commissioner until the next day, December 7 (See original Record "Final Committment"). Three or four days later Mr. Brenner went down to the police station and identified all three of the suspects presented to him in a lineup of 4, 5, or 6 persons (Tr. 117).

No Gun License. Testimony was adduced from a Court liaison officer that he had searched the records of the

Metropolitan Police Department, and found no record that appellant was licensed to carry a gun on December 6, 1963 or at anytime before that date. An affidavit of Deputy Police Chief Covell was introduced to the same effect (Tr. 154, 155).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the U. S., Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the U. S., Fifth Amendment:

***nor shall be compelled in any criminal case to be a witness against himself, *** nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***

Federal Rules of Criminal Procedure, Rule 5(a):

***any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby

officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

STATEMENT OF POINTS

1. There was no probable cause for appellant's arrest without a warrant and it was therefore illegal, as a violation of the Fourth Amendment.

2. Appellant's arrest being illegal, the search of his person and the auto in which he was riding was also illegal and rendered the evidence obtained and the objects seized as a result thereof, inadmissible in evidence which illegal fruits should have been suppressed.

3. The apologetic confession made by appellant after his illegal arrest when confronted by the complaining witnesses was not voluntary and should have been suppressed under the Fifth Amendment.

SUMMARY OF ARGUMENT

1. Illegal Arrest. An arrest without a warrant for an offense not committed in the presence of the person making the arrest can be legally made only when the arresting officer has "probable cause" that the person arrested is guilty

of a felony. What constitutes "probable cause" depends upon the particular circumstances in each case. Here, although it is not clear just when the arrest was effected, there was not sufficient "probable cause" present to warrant appellant's arrest, and at least not until after the appellant had been the subject of an unreasonable search.

2. Unreasonable Search. Appellant, though suspected of a crime, is entitled to the protection afforded to all persons under the Fourth Amendment to the Constitution of the United States, to be secure in his person and effects against unreasonable searches and seizures.

A revolver, later identified as being in the possession of appellant while he was perpetrating a crime, was removed from underneath the seat of an automobile in which appellant was a guest passenger. This search and seizure was accomplished by a police officer without a search warrant and prior to arrest of appellant. And it was not shown that the search conducted was incident to a legal arrest of defendant. The demonstration in the facts at trial of appellant revealed only that one police officer, having information that a crime had been committed and instructions to be on the lookout for a car with a certain license number, stopped the automobile in which appellant was a guest, and asked the

operator for his driver's license and automobile registration; then 2 other police officers arrived, appellant was taken out of the car, and the first police officer observed one of the other officers search the automobile and seize the subject revolver; whereupon appellant was taken to the scene of the crime for identification purposes.

It was not shown that the officer who stopped the car arrested appellant; nor that the searching officer arrested appellant prior to the search; or assuming, arguendo, that he did, that he had probable cause to arrest appellant. Thus adding up to an unreasonable search and seizure of appellant's person and auto in which he had been a passenger.

3. Involuntary Confession. Appellant also is entitled to the protection of the Fifth Amendment to the Constitution of the United States and not be compelled to be a witness against himself.

Appellant was so compelled when he was forced into confrontation with the complaining witnesses, coerced into an apologetic confession, which was reiterated at his trial before a jury.

This confession, used against appellant numerous times during the trial, was obtained by police officers under coercive circumstances after the arrest of appellant, before

presentation of appellant to a committing magistrate and during a period of unnecessary delay giving the police officers many opportunities for the extraction of a confession from appellant; denying appellant the due process to which he was entitled under the Fifth Amendment to the Constitution and of Rule 5(a) of the Federal Rules of Criminal Procedure.

ARGUMENT

I. There was no probable cause for appellant's arrest without a warrant and it was therefore illegal, as a violation of the Fourth Amendment.

With respect to Point I. appellant desires the court to read the following pages from the reporter's transcript: Tr. 26-37 inclusive, the hearing on the motion to suppress, 85-87 inclusive; and 94-96 inclusive, being the testimony of Officer Poole at the trial.

It is not entirely clear when the appellant was arrested because on the hearing of the motion to suppress, Officer Poole testified that the other officers had arrested appellant (Tr. 34). While at the trial Officer Poole testified that technically he arrested the appellant when he stopped the car (Tr. 94-95). This may be correct and the presence of the dog with Officer Poole should be considered on the question of when the arrest was accomplished (Tr. 27).

According to Officer Poole's testimony at the time he stopped the vehicle, he had information that a robbery had been committed and the license number of an auto believed to be red, 1962 Buick in which there were supposedly 3 or 4 Negro males and the name of the registered owner of the vehicle in question (Tr. 27-30). It is submitted that these facts did not constitute "probable cause", that the appellant whose

identity was unknown, but who was discovered riding in an automobile some miles distant from the scene of the crime and about 1/2 hour later in time, had committed a felony or had participated in the robbery.

The legality of the arrest must be determined at the time it was made, and the subsequent discovery of incriminating evidence must not be permitted to influence that determination. Henry v. United States, 361 U. S. 98, 4 L.ed 2nd 134, 80 S Ct. 168 (1959); United States v. Di Re, 332 U. S. 581 (1948).

This falls far short of probable cause for arresting him. See United States v. Di Re, supra, where the defendant was arrested in an automobile immediately after his companion had sold forged ration coupons to an O.P.A. informer, and Henry v. United States, supra, 361 U. S. at 103, where the court observed that all the defendants' acts upon which their arrest was based -- including putting two successive loads of unidentified cartons (actually containing stolen radios) into their car from an alley -- "were outwardly innocent."

Mere suspicion as existed here is not enough to constitute "probable cause" for an arrest without a warrant. Mallory v. United States, 354 U.S. 449, 1 L. ed. 2d 1479, 77 S Ct. 1356.

In Henry v. United States, supra, it is stated at 361 U. S. 100:

> "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required.***
>
> "That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this day. See United States v. Di Re, 332 U. S. 581, 593-595; Johnson v. United States, 333 U. S. 10, 13-15; Giordenello v. United States, 357 U. S. 480, 486. Its high water was Johnson v. United States, supra, where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant. It was against this background that two scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty.'"

See also Whitley v. United States, 99 U.S. App. D. C., 159, 237 Fed. 2d 787 (1956), a narcotics case in which it was held that the police had no right to be on a porch which was not open to the public and which they had reached by going through a window, and further held, that what they had seen from the porch, even if it gave them probable cause to believe

that the person observed had committed a felony would not justify them in arresting her and searching her room.

Thus, it is urged that there was no probable cause for the arrest of the appellant without a warrant and it was therefore illegal under the Fourth Amendment to the U. S. Constitution.

II. Appellant's arrest being illegal, the search of his person and the auto in which he was riding was also illegal and rendered the evidence obtained and the objects seized as a result thereof, inadmissible in evidence which illegal fruits should have been suppressed.

With respect to Point II, appellant desires the Court to read the following pages from the reporter's transcript: Tr. 26-37, 57-58, 68-69, 85-87, 94-96, 105, 108, 113-114.

After Officer Poole stopped the vehicle and the other officers arrived, appellant, a co-defendant, was ordered out of the car and the car was searched, and two guns were discovered. Thereafter, appellant and co-defendant were taken to the scene of the crime and were identified by the complaining witnesses and reportedly "apologized" to them. Thus, the identifications, the gun, and the confessions were all obtained as a result of the illegal arrest, and the motion to suppress this evidence should have been granted.

Evidence procured by means of an illegal arrest is inadmissible, Wong Sun v. United States, supra, 371 U. S. 471 (1963), and the fruitfulness of a search following such an arrest cannot justify it retroactively, Henry v. United States, supra, 361 U. S. 98, 104 (1959).

In Preston v. United States, 11 L. Ed. 2d 777 (1964), the Supreme Court held that the search without a warrant of an automobile which had been impounded a few minutes earlier, immediately following its occupants' 3:00 a.m. arrest, was unreasonable, was not incidental to the arrest, and therefore violated the Fourth Amendment and rendered inadmissible the evidence seized.

Justice Black, writing for a unanimous Court, pointed out that none of the factors traditionally cited as making searches incident to arrest reasonable despite the absence of a warrant could justify that search after the car and its occupants had been taken in custody. "At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . . . . Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction." 11 L.Ed. 2d at 799.

In the instant case, after the occupants had been removed from the vehicle and were in police custody, the police were in complete control of the situation and there was no danger of appellant using the gun, or destroying the evidence which might be in the car, and further, there was no danger that the vehicle might be removed. Thus, there were no facts existing here rendering a warrantless search any more necessary or reasonable than in the Preston case, and the said search which uncovered the gun, was illegal.

Further, the arrest and the discovery of the gun later resulted in the identifications and confessions, which led to appellant's conviction

III. The apologetic confession made by appellant after his illegal arrest when confronted by the complaining witnesses was not voluntary and should have been suppressed under the Fifth Amendment.

With respect to Point III appellant desires the Court to read the following pages from the reporter's transcript: Tr. 58, 69, 72, 78, 89, 91, 92, 105, 108, 113, 131-137, 139, 141-142, 147-153, inclusive.

After the search of the vehicle appellant was taken to the scene of the robbery (over 2 miles distant) and presented before the complaining witnesses by detectives Allen and

Parlati, who had the gun at the time. Before taking appellant into the store to be confronted by the complainants, Detective Allen told him the purpose was to let the complainants look at him and that appellant's companion who had just previously been taken into the store had been identified by the complainants and he had apologized to them by saying he was sorry, didn't mean to hurt anybody, and needed money, etc. (Tr. 141,142).

Detective Allen then took appellant Veney into the store, displayed him in front of the complainants in the presence of several other police officers, and while holding him by the belt (Tr. 137) Veney was admonished, "Do you want to say anything to the people." Veney, remaining silent, was prodded with, "Don't you want to say anything." Then he said, "Well, I apologize." (Tr. 78).

All of this went on after the complaining witnesses had been told that the hold-up men had been caught and were going to be brought in one at a time for identification (Tr. 72, 108). Thus, the identification was in the nature of a leading question to the complaining witnesses, i. e., "These are the robbers, aren't they?".

Thereafter, appellant was "processed" at police headquarters for several hours (Tr. 139) and taken before the

U. S. Commissioner the next day (See Commissioners report dated December 7).

In the light of these events, and the subsequent recitation of appellant's confession many times before the jury, (Tr. 58, 69, 78, 105, 134, 151, 152) appellant's "trial", if indeed any he had, was held by the Metropolitan Police Department at the scene of the crime.

Appellant's arrest being made without a warrant, Rule 5 FRCrP required that the arresting officer take him, without any unnecessary delay, before the nearest available commissioner or judicial officer so that he could properly be informed of the complaint against him, and that he was not required to make a statement and that any statement made by him might be used against him, which the police did not do.

The next step, after such an arrest, was to see that appellant had the benefit of legal advice as to his rights. The sidewalk information imparted to appellant by detective Allen was no legal substitute for this. Greenwell v. United States, U. S. App. D. C. No. 18,193 (decided 8/13/64).

As the Supreme Court said in Mallory v. U. S., 354 U. S. 449, 455:

> "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the

> story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession." (underscoring supplied)

The apologetic confession of appellant should thus have been held inadmissible at the trial. Mallory, supra; Jones v. United States, 113 U. S. App. D. C. 256; 307 F.2d 397; Naples v. United States, 113 U. S. App. D. C. 281, 307 F.2d 618; the motion to suppress which was consistently urged should have been granted.

There is no allegation here that appellant was beaten into a confession. But there were all the elements present to coerce an involuntary admission of guilt: transfer of custody from police officer to police officer; individual (from his companions) return to the scene of the crime; revelation of companion's guilty statement; admonition to talk; confrontation by complaining witnesses along with the pistol evidence; held by belt in the midst of several police officers; delay in presentment before a judicial officer. The identity of confessions of the three men out of the presence of each other could not be a mere co-incidence and this fact indicates that the words were put in their mouths (Tr. 58, 69, 78, 105, 134).

Thus, there were many opportunities for the police to elicit a confession from appellant in psychological circumstances where any other action would brand him as uncooperative and at a time when he had no idea of what his legal rights were, or a chance to find out what they were.

Introduction of testimony as to this confession of appellant was not competent evidence and thus in complete derogation of his right of due process and a fair trial, and should have been suppressed. Mallory v. United States, supra; McNabb v. United States, 313 U. S. 332.

CONCLUSION

For the reasons stated, appellant respectfully submits that the judgment must be reversed and the case remanded to the District Court with appropriate instructions.

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CERTIFICATE OF SERVICE

I certify that I have personally served a copy of this brief on David C. Acheson, United States Attorney, by delivering a copy thereof to his office.

Carleton U Edwards II
CARLETON U. EDWARDS, II

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,714

ROLAND F. VENEY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,715

HOWARD R. BAYLOR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether appellants were properly arrested by police officers who—

(1) received a general broadcast to be on the lookout for a particularly described automobile bearing particular license tags containing three or four male occupants;

(2) which vehicle was seen moments before at the scene of a holdup;

(3) where the broadcast was based upon a citizen's report that immediately before the holdup he observed the driver of the automobile coming from the holdup store and had just previously observed this same individual in his own neighboring store acting in such a peculiar manner as to prompt the citizen to follow him to the front of his store and record the license number of the automobile in which he drove away.

2) Whether statements made by the appellants immediately after their apprehension were admissible where appellants were arrested in the getaway car two miles from the scene and were taken back to the scene by the arresting officers, who were not the officers investigating at the scene, and where upon confrontation with the four victims the appellants each stated that they meant no harm but merely wished to get money to pay bills.

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,714

ROLAND F. VENEY, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,715

HOWARD R. BAYLOR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellants were indicted together and with one Frantz C. Veney on January 27, 1964. The indictment,

consisting of 6 counts, charged the appellants with assault with intent to commit robbery upon four individuals whom the evidence described to be co-owners of the Capital Wholesale Distributors in the District of Columbia (22 DCC § 501). The last two counts of the indictment charged the appellants with carrying a dangerous weapon (22 DCC § 3204). Upon verdicts as indicted returned April 23, 1964, appellants were given concurrent sentences of 3 to 9 years on the four felony counts and a concurrent one year sentence on the misdemeanor count. The issues raised on appeal revolved around appellants' arrest and their statements made upon immediate confrontation with the four victims in the store.

The Arrest

The arrest of the appellants were made possible by the alertness with which Mr. Michael Ray Marvin reacted to what appeared to him to be peculiar conduct on the part of a man who entered his store in the late afternoon of December 6, 1963. Mr. Marvin was employed in the A & A Appliance Store, located at 7614 Georgia Avenue, N. W. (Tr. 124.) The Capital Wholesale Store is located next door at 7616 Georgia Avenue, N.W. (Tr. 44). What Mr. Marvin did and saw occurred shortly before the offense in question.

A man came into Mr. Marvin's store and to Mr. Marvin "something looked funny". Apparently Marvin's suspicions were aroused because the man pretended to purchase a toaster (Tr. 125), and "the way he approached us when he came into the store, both hands in his pocket[s] and a long trench coat, it just didn't look Kosher" (Tr. 129). When the man left Marvin followed him as far as the front window of the store, and observed him get in a red car, containing two or three others, and drive away. Because of the peculiar behavior evinced within the store Marvin recorded the license number of the car on a piece of paper. (Tr. 125-6.) Mr. Marvin stated that on prior occasions he had recorded

license numbers on cars of people who came into his store when he thought the behavior of the individuals to be out of the ordinary (Tr. 128, 130). Shortly thereafter Mr. Marvin left the appliance store and upon returning he again saw this same individual coming out of the "pocketbook store" (Tr. 126). The pocketbook store is Capital Wholesalers. Mr. Marvin went on in his store remarking that this same individual had just left the store next door. When Marvin again looked out the man was gone. (Tr. 127.) Shortly thereafter the police arrived in response to a call for help resulting from the offense in question. When the police arrived Mr. Marvin gave them the license number which he had recorded and a description of what he had observed (Tr. 127, 161). Detective Strange received the information from Marvin and immediately put out a general broadcast to all units to be on the lookout for a red car bearing District tags KG-346 (Tr. 161).

Canine Officer Poole,[1] who was cruising with his dog in the general area of the 7600 block of Georgia Avenue, received the general broadcast and was thus informed of the car bearing the particular license number, and the fact it was wanted in connection with the holdup of the Capital Wholesalers. The broadcast also informed that an eyewitness reported having seen the car, occupied by three or four persons, leave the scene. (Tr. 36.) The broadcast informed Officer Poole that the vehicle left

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[1] The court conducted a hearing on the motions to suppress before the trial of the case commenced (Tr. 26-38). Officer Poole was the only witness called at the hearings. The testimony of Mr. Marvin and Officer Strange has been set forth in the foregoing manner for purposes of clarity and continuity. Appellee merely notes that appellants were satisfied to have their motions to suppress decided solely on the testimony of Officer Poole. The motions to suppress were based solely upon alleged illegality of the arrest. The court was not called upon at that time or any other time to consider the issue of voluntariness of certain statements. Likewise, at no time during the hearings did either appellant address questions or arguments to the so-called *Mallory* issue, and no objection was made when the victims were asked about appellants' statements. See Argument II, *infra*.

traveling south on Georgia Avenue. Within a matter of a few minutes Officer Poole observed the described automobile traveling south on nearby North Capitol Street. (Tr. 28-9.) Officer Poole turned his car around and after a short distance pulled the automobile to the curb. In the process of doing the latter he received a third radio message to the effect that the described car was owned by one Frantz Veney. Officer Poole informed the dispatcher that he had stopped the car and then he proceeded to order the driver out of the car and asked for his license and registration card. (Tr. 30.) Veney took his keys with him and proceeded to display his driver's license and registration card. "Within a matter of seconds, Cruiser 230 was on the scene with Officers Mode and Clarke, and when they got on the scene [they] took the other two out of the car and searched them." [2] (Tr. 32.) Immediately after the three were searched a search of the automobile revealed two pistols beneath the right front seat (Tr. 32-33).

The Offense

The testimony of the four complaining witnesses as to the offense was substantially the same. They identified the appellants. (Tr. 48, 64-65, 98, 111.) From the testimony of these four witnesses it appears that the defendant, Frantz Veney, first came into the store and indicated an interest in an inexpensive bag or pocketbook. When directed to the appropriate place, this individual walked right on out of the store. Within a matter of minutes the appellants came in brandishing guns and ordered the four witnesses to the back of the store saying, "This is a holdup." (Tr. 48, 50, 65, 66, 97, 110, 112). With the victims herded to the back of the store the appellants proceeded to search and upon finding nothing fled when a telephone rang (Tr. 54, 67-8, 103, 113).

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[2] Since the broadcast was general all three officers had the same information (Tr. 33).

The Statements

The place of appellants' arrest was approximately two miles from the location of the offense (Tr. 36). When the appellants were arrested the officers returned them to the scene. In turn, each was taken into the store in order that the four complaining witnesses could be confronted with them. According to the testimony of Mrs. Simony both appellants said to her that they intended no harm that they just wanted to get some money to pay some bills. (Tr. 58). According to the testimony of Mr. Simoney, Baylor said he was "sorry that I did it, that he just needed money to pay bills". Appellant Veney said basically the same thing. (Tr. 69.) According to Mrs. Brenner appellant Veney said that he did not mean to harm anyone and that Baylor said basically the same thing and "he was sorry that he got in the mess." (Tr. 105). Mr. Brenner didn't recall that appellant Baylor said anything but Veney expressed sorrow for molesting them and frightening them. (Tr. 114).

According to the testimony of Detectives Allen and Parlati neither of them prompted or encouraged the appellants to saying anything. However, Mr. Simoney recalled "the policeman asked them, 'Do you want to say anything to the people?' and they kept quiet. They said, 'Don't you want to say anything?' so (they) says, 'Well, I apologize.'" (Tr. 78.)

At no time during the testimony of any of the complaining witnesses did the appellants object on any ground to the use of the appellants' statements. No hearing on voluntiness was requested. No record has been made on any *Mallory* issue either. See footnote 1, *supra*. Neither appellant requested an instruction on the voluntariness of the appellants' statements although there were some formal instructional requests submitted.

STATUTES INVOLVED

Title 22, District of Columbia Code, § 501, provides:

> Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

Title 22, District of Columbia Code, § 3204, provides in part:

> No person shall within the District of Columbia carry either openly or concealed on or about the person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.

SUMMARY OF ARGUMENT

I

Immediately upon responding to the scene the police were informed of Marvin's observations of an individual who had been at the scene at the time the crime was committed and shortly before. That individual was seen to depart the scene in a particular automobile containing other passengers. So peculiar was the behavior of this individual that a citizen was prompted to record the automobile license number. Thereafter officers responding to a general lookout for this automobile observed it in the vicinity traveling in the same direction as when last seen. This coupled with all of the other circumstances in the case gave rise to a valid arrest of the appellants.

II

The statements made by the appellants when they were returned the two mile distance to the scene were admis-

sible in evidence on the ground preserved at trial surrounding the arrest. No other basis for exclusion was preserved at the trial. In any event the statements were admissible under decisions enforcing Rule 5, F.R.Cr. P. and are not excludable on the ground that they were involuntary as a matter of law.

ARGUMENT

I. There was probable cause for appellants arrests.

(See Tr. 26-38, 125-129, 159-161)

Appellants attacked the admissibility of the guns found in the automobile[3] and their subsequent statements on the ground of an illegal arrest.[4] As appellee views the issue of the arrest in this case it is whether a police officer cruising within a two mile vicinity of a holdup within minutes of the holdup may arrest the occupants of a particularly described automobile seen by an eyewitness leaving the scene of the holdup and traveling in the same general direction when it was stopped. It seems to appellee understandable that all the data made available to Officer Strange by Mr. Marvin could not be imparted with any degree of particularity to all police officers through the means of a general broadcast. Of necessity much must be deleted. Therefore, in the context of this case it seems inappropriate to view the issue of probable cause solely from the radio speakers in the cars of the arresting officers. Appellee does not thereby concede that on that basis alone there was insufficient

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[3] The search of which was proper if there was probable cause for the arrest. See *Adams* v. *United States*, No. 18,486, decided August 20, 1964.

[4] Appellant Baylor's *pro se* motion to suppress, which was abandoned when counsel filed a subsequent motion to suppress, asserted due process violation by way of delay after arrest. However, as has been observed, nothing was done to prepare a record on the *Mallory* point or to preserve it for review. See *George Williams* v. *United States*, 113 U.S. App. D.C. 7, 81, 303 F.2d 772, 774, n. 2 (1962).

basis for arrest. We do suggest that where possible, as here, the court ought to view the situation surrounding the arrest in its entirety. Therefore, we feel it relevant to take cognizance of Mr. Marvin's report to Officer Strange at the scene.

Mr. Marvin described the conduct of the man who came into his store as "funny" and as "not Kosher". So peculiar was the man's conduct that Marvin followed him to the front of the store, observed the automobile in which he drove away together with three or four others and recorded the license number. Within a few minutes he observed the same man coming out of the victims' store at about the time that the offense occurred. However, not knowing of the offense he had no reason to act. But within a few seconds the police officers arrived and Mr. Marvin knew that he most probably possessed valuable information regarding the offenders. Officer Strange in an effort to find out what he could questioned people on the sidewalk (Tr. 159-161). Mr. Marvin gave him the benefit of his fortuitous observation and Officer Strange immediately sent out a general lookout for the automobile.

Under all these circumstances appellee submits that the arrest of the appellants was proper. Indeed, the arresting officers had no other choice. See *Williams* v. *United States*, 113 U.S. App. D.C. 371, 308 F.2d 326 (1962) and cases cited.

II. The statements were properly received in evidence.

(See Tr. 36, 58, 69, 78, 105, 114)

Both appellants appear to pitch their argument regarding the statements primarily on the basis that they are shown to be involuntary as a matter of law. However, appellee notes interspersed in this argument are citations to authorities relevant to Rule 5(a), F. R. Cr. P. Accordingly, appellee will deal with the admissibility of these statements generally.

An argument directed to Rule 5(a), F. R. Cr. P.,[5] of necessity means that the appellants allege that where an arrest is made the arresting officer has no other responsibility than to transport the arrested person, perhaps with some brief administrative detour, directly before the U.S. Commissioner. As appellee understands it no case so holds. All Rule 5 cases look to the specific facts.

The circumstances of this case in appellee's view clearly justify the confrontation between the victims and the criminals. The appellants were almost immediately stopped in their automobile by officers not directly connected with the investigation. All the officers knew (albeit, enough to make an arrest) was that this automobile and the occupants were probably involved in the crime. They certainly had insufficient particulars to arrange for booking and presentment. As has been observed in Argument I, *supra*, much more was indeed known by other officers. The hour was late in the afternoon, Friday, December 6, 1963. The location of the arrest was within two miles of the scene of the crime. The investigating officers were still on the scene. Certainly, an immediate confrontation was warranted. So, too, were the arresting officers justified in turning the appellants over to the officers responsible for the investigation. The confrontation with the victims and an opportunity to explain their presence at the scene of the crime should not be condemned.

Appellee would not view the *Greenwell*[6] decision as controlling in the circumstances of this case. *Greenwell* involved an arrest in Texas on a warrant for bank robbery committed in the District of Columbia. The identification of the person wanted in the warrant had been established and the investigation had for all practical purposes been completed (although location of the loot was still to be accomplished). Here it can hardly be said

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[5] Which, if successful, must fall within the plain error rule. See footnotes 1 and 3, *supra*.

[6] *Greenwell* v. *United States*, No. 18,193, decided August 13, 1964.

that the investigation had become such as to focus definitely on the appellants and no others, and that nothing further remained to be done. Therefore, whether it may not have been proper for the FBI to stop under a street light with Greenwell for the purpose of asking him questions that conclusion by no means compels a holding that returning appellants to the scene of the crime under the circumstances outlined herein violates Rule 5.

Nor is this case like *George Williams* v. *United States*, *supra*, where the defendant was arrested on a warrant and taken to police headquarters and there taken back to the scene, where he made a statement.

With regard to the issue of voluntariness appellee merely observes that it is before this Court only if it is a plain error effecting a substantial rights under 52(b), F. R. Cr. P. This is so because at no time prior to or during the trial was an issue of voluntariness raised. Therefore, it is apparent that there is nothing in this record on which this issue can be resolved. Moreover, under the circumstances surrounding the statements it appears to appellee that limited remand to develop additional material would be futile. Indeed, appellee submits the issue of voluntariness is beyond the reach of this Court both as to the facts and the instructional aspects.[7] See *Schowers* v. *United States*, 94 U.S. App. D.C. 374, 215 F.2d 764 (1954) and *Hawkins* v. *United States*, 109 U.S. App. D.C. 338, 342, 288 F.2d 122, 126 (1960), concurring opinion by Bazelon, J.

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[7] We note appellants cite no authority holding facts similar to those of record here to make out a case of involuntariness as a matter of law. Such a legal conclusion cannot be supported on this record.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgments of the District Court be affirmed.

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